Hon. Judge Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHINTAN MEHTA, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF STATE, et al., Defendants.	Case No. 2:15-cv-1543-RSM DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT Noting Date: March 11, 2016[1]

[1] On March 8, 2016, the Court granted Plaintiffs' request for a one-day extension of time to file their opposition brief, and correspondingly gave Defendants one additional day to file the reply brief. As a result, this brief was filed one business day after the noting date. *See* ECF No. 29.

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Plaintiffs continue to challenge Defendants' decision to republish the October 2015 Visa Bulletin ("Revised Bulletin") with six revised dates as violating the Administrative Procedure Act ("APA") and the Fifth Amendment's Due Process Clause. Plaintiffs have now limited their requested relief to the reinstatement of the October 2015 Visa Bulletin issued on September 9, 2015 ("Superseded Bulletin"). Plaintiffs' claims should be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(1) for lack of jurisdiction and under Rule 12(b)(6) for failure to state a viable claim for relief.

Plaintiffs incorrectly assume that any unsupported or vague allegation is sufficient to plead a claim under the APA. This is not the case. The APA carefully describes the types of agency actions subject to judicial review and requires that the challenged decision be final and not left to the discretion of the agency by Congress. Those requirements have the purpose of protecting the agencies from suit that is based on nothing more than a member of the public's general disagreement with a judgment made by an agency. Plaintiffs cannot overcome these requirements or the applicable pleading standard by merely pronouncing an agency action wrong or speculating that the agency has taken action contrary to its publically-announced position. Plaintiffs have an obligation to identify the challenged decision with specificity and demonstrate that their alleged injury can be remedied by this Court. Plaintiffs have not satisfied that obligation and, as a result, their claims fail for lack of subject matter jurisdiction, failure to state a claim, and for lack of standing.

Plaintiffs' defense of the constitutional claim is similarly unavailing. Plaintiffs have no legally protected interest capable of overcoming Defendants' statutory obligation to correct errors in a pre-effective, discretionary publication. Rather than identify a legal foundation for their asserted property interest, Plaintiffs instead devote considerable space to discussing actions taken by various Plaintiffs in reliance on the Superseded Bulletin. Plaintiffs admit, however, that these alleged losses are not redressable in this litigation. They are also not sufficient to create a constitutionally protectable interest in filing an application for adjustment of status. Defendants respectfully request that the Court grant the motion to dismiss.

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I. The APA does not confer jurisdiction over Plaintiffs' claims.

A. Plaintiffs do not challenge a final agency action.

In order to state a claim challenging an administrative action under the APA, Plaintiffs must show that the action they challenge is a final and unalterable decision from which rights and obligations flow. *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *Mount Adams Veneer Co. v. United States*, 896 F.2d 339, 343 (9th Cir. 1990); *see also* 5 U.S.C. § 701(a)(1). Plaintiffs' APA claims challenge six revisions to the Dates for Filing Visa Applications Chart ("Filing Chart"), one of two charts contained in the Superseded and Revised Bulletins. The Filing Chart was added to the bulletin in October 2015 and contains dates representing the earliest date for when applicants may be able to apply for adjustment of status. Prior to the Superseded Bulletin, applicants at all times used the dates contained in the other chart, the Final Action Chart, to determine when they may be eligible to file an application for adjustment of status. The Final Action Chart contains dates that represent when a visa number may be authorized for issuance.

In its motion to dismiss, Defendants raise three arguments regarding the lack of finality of the Filing Charts. Defendants argued (1) the Filing Charts are not "unalterable" because they may be revised at any time and are scheduled for revision on a monthly basis, *see* ECF No. 22-3 (noting that at any time, a category may become unavailable and that applications would no longer be accepted); (2) no legal consequences flow from the publication of the Filing Charts, because at least two other decision are necessary before conferring any benefit (a) a decision must be made regarding whether the Filing Chart or Final Action Chart governs at any given time, *see* www.uscis.gov/visabulletininfo (last visited Mar. 14, 2016), and (b) the application must be accepted by U.S. Citizenship and Immigration Services ("USCIS") as properly filed; and (3) the Filing Charts from the Revised Bulletin are no longer final agency action because in the time since the complaint was filed, the Department of State ("DOS") has issued newer Filing Charts (in the November, December, January, February, and March Visa Bulletins) and Defendants have updated their process for notifying applicants as to which chart to follow in submitting their adjustment of status applications. *See* www.uscis.gov/visabulletininfo "If USCIS determines that there are more immigrant visas available for a fiscal year than there are known

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applicants for such visas, we will state on this page that you may use the Dates for Filing Visa Applications chart. Otherwise, we will indicate on this page that you must use the Application Final Action Dates chart to determine when you may file your adjustment of status application.") (last visited Mar. 14, 2016).

Plaintiffs do not address the unique features of the Filing Charts and the new two-chart system and, instead, cite to cases pre-dating the current system. Plaintiffs also cite cases from unrelated areas of agency practice to suggest that an action may be final even if it may later be revisited. *See* ECF No. 30 at 13. These cases present a readily-distinguishable situation where the agency has made a definitive determination that could at a future time be revisited. Here, the Filing Charts are not definitive determinations because they are necessarily subject ongoing revision based on fluctuating demand for visa numbers.

Importantly, Plaintiffs also fail to address Defendants argument that, even if the Court finds that in some instances the Filing Charts can constitute a final agency action, the Court should find that the challenged Filing Charts from the Revised Bulletin are no longer the agency's final statement. In the time since the complaint was filed, DOS has issued newer Filing Charts (in the November, December, January, February, and March Visa Bulletins). Defendants have also updated their process for notifying applicants as to which chart to follow in submitting their adjustment of status applications. Under the current system, DOS issues the bulletin with both Final Action and Filing charts and then, separately, USCIS notifies applicants of which of the charts applicants are permitted to use. *See, e.g.*, www.uscis.gov/visabulletininfo (presently designating the Filing Charts for Family-Sponsored Filings and the Final Action Charts for Employment-Based Filings) (last visited Mar. 14, 2016). Therefore, neither the Revised Bulletin nor the Defendants' practice of notifying applicants which chart to use in the bulletin represent Defendants' current or final position. The Court lacks jurisdiction to review those non-final decisions.

B. DOS's "reasonable estimates" are not subject to judicial review.

The Court also lacks jurisdiction under the APA, 5 U.S.C. § 701(a)(2), to review Defendants' decision to revise the Filing Chart as it is based on "reasonable estimates" of when

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visa numbers may be authorized for issuance. The decision on how to conduct these estimates and manage their statutory obligations is left to Defendants' discretion by the INA. *See* 8 U.S.C. § 1153(g). Plaintiffs' inability to articulate a standard to apply to their "reasonable estimate" claims demonstrates this point. Plaintiffs instead focus on the statute's "reasonableness" directive without addressing the difficult, multi-variable decision underlying that directive.

As explained in Defendants' motion, Congress strictly limits the number of visas that may be issued annually, *see* 8 U.S.C. §§ 1151(a)(2), 1152(a)(2), but empowers DOS to reasonably determine how closely it must walk the fine line between using all available visa numbers and not exceeding its statutory authority, 8 U.S.C. § 1153(g). That decision goes to the heart of the agency's expertise assessing "many variables" in determining the appropriate tolerance for risk Defendants should have for exceeding the congressional limits on immigrant visa issuances. *Id*. It is a decision that the "agency is far better equipped than the courts" to make. *Heckler v. Chaney*, 470 U.S. 821, 831-32 (1985).

As a result, there is no standard to apply in assessing the reasonableness of Defendants' discretionary determination of how to manage their statutory obligation. In the absence of any meaningful standard by which to base a decision, judicial review would amount to nothing more than a court substituting its policy preference for the judgment of the executive. *See Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55, 63-64, 66-67 (2004). Courts are not permitted to substitute their judgment for that of the agency under the APA. *See Motor Vehicle Ass'n v. State Farm Ins.*, 463 U.S. 29, 41 (1983). The decision is one that is "peculiarly within [Defendants'] expertise," *Heckler*, 470 U.S. at 831-32 and, therefore, not subject to review under the APA.

II. Plaintiffs have not overcome the legal and pleading deficiencies in their APA claims.

A. DOS fully explained its reason for issuing the Revised Bulletin (Count I).

Plaintiffs appear to lose sight of the "policy shift" they challenged in Count I of the complaint. There, Plaintiffs assert Defendants have a policy of issuing only one visa bulletin per month and criticize Defendants' explanation for departing from that policy as insufficient. ECF No. 7 at 5 (Defendants acted arbitrarily and capriciously by failing to explain "its departure from

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its practice of issuing a single, definitive Visa Bulletin each month.”). Now, Plaintiffs appear to argue that the dates in the Superseded Bulletin represent a policy statement that demands a rigorous, mathematical justification to override in favor of the dates in the Revised Bulletin. Both formulations of Count I fail as a matter of law.

If the alleged policy change Plaintiffs are challenging is the one set forth in Count I of the complaint, then the Court must only determine whether Defendants have explained the decision to depart from their “policy” of issuing only one bulletin per month. Viewed that way, Defendants’ simple explanation (*i.e.*, Defendants identified six dates that needed to be updated whereas in previous months Defendants were satisfied with the initial version of the bulletin) is sufficient to justify a departure from that past practice. Even in the context of the same agency reversing its own past policy choice, the agency is not required to justify the change with any more of a justification than would be necessary if that decision had been made in the first instance. *See FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). Defendants have explained that the Revised Bulletin was issued based on Defendants’ determination that some of the Filing Chart dates in the Superseded Bulletin did not accurately reflect the visa number availability required for USCIS to accept adjustment of status applications. *See* ECF No. 22-7 (“Dates for Filing Applications for some categories . . . have been adjusted to better reflect a timeframe justifying immediate action in the application process.”). The explanation, therefore, meets the standard proposed by Plaintiffs.

Even if Plaintiffs have now changed their allegation in Count I, they still have not alleged a plausible change in policy and, as a result, their reliance *Fox Broadcasting* is misplaced. *Cf.* ECF No. 30 at 16-17. The *Fox Broadcasting* standard should not apply to changes to estimated dates because those dates cannot be said to represent “policy statements” such that pre-enforcement changes constitute “shifts in policy.” *Fox Television Stations,* 556 U.S. at 515. To the extent the *Fox Broadcasting* standard could ever apply to an estimated date, it should only apply where there has been a methodological shift in how the estimate was made. Here, Plaintiffs acknowledge that the methodological change occurred with the Superseded Bulletin, *see* ECF No. 22-1 at 19-21, which implemented the President’s modernization plan and expanding the

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number of individuals potentially eligible to file for adjustment of status by including a second set of charts. The Revised Bulletin does not shift the policy set forth in the Superseded Bulletin, but merely revises six estimates contained in the new charts. Therefore, Plaintiffs have failed to plead a policy change requiring any additional explanation. *Cf. Alaska Dep't of Envtl. Conservation v. EPA*, 540 U.S. 461, 497 (2004).

B. Plaintiffs' new subdelegation claim lacks merit and is not a claim for which Plaintiffs have standing (Count II).

In their opposition briefing, Plaintiffs revise their argument under Count II to challenge USCIS's authority to determine whether to accept filings based on the new Filing Charts or based on the traditional Final Action Charts. ECF No. 30 at 17-18. Instead, Plaintiffs argue that DOS has exclusive authority to determine visa number availability and that USCIS is now playing an unlawful role in the application process. *Id*. There are at least two major problems with this new formulation of the subdelegation claim.

First, Plaintiffs are confusing DOS's role in calculating visa number availability as reflected in the "Final Action Charts" and USCIS role in determining whether, at any given time, visa demand is such that USCIS is able to accept *more* adjustment of status applications than permitted under the Final Action Chart (such that the Filing Chart may be relied upon instead). Plaintiffs are correct that DOS is responsible for maintaining the priority date list and for publishing the monthly Visa Bulletin. Defendants do not dispute that USCIS must accept an application that is submitted in compliance with the effective Final Action Chart if all other eligibility criteria are met. That, however, is not the issue presented by this case. Here, Plaintiffs are attempting to legally equate USCIS's obligation to process applications submitted in compliance with the Final Action Chart with their discretionary authority to accept additional applications under the new Filing Chart when demand allows. None of the regulatory authority cited by Plaintiffs supports Plaintiffs' contention. Those regulations task DOS with the determination of when a visa number is available to be issued, which is then inputted into the Final Action Dates Chart. Those regulations in no way limit USCIS's ability to accept additional applications in accordance with another chart, also published in the bulletin, based on the current

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demand pending before USCIS.

It is in this respect that Plaintiffs' argument lacks internal consistency. They appear to argue that USCIS is obligated to accept applications submitted under the *Filing Charts* because USCIS has in the past lacked authority to ignore the *Final Action Chart*. If the Final Action Chart creates a non-optional obligation for USCIS, then there is no logical room for Plaintiffs contention that USCIS must now ignore the Final Action Chart in favor of another set of dates. In the end, the INA, the regulations, and circuit precedent explicitly recognizes that this is a cooperative process. *See* 8 U.S.C. §§ 1153(e)(1), 1255(b); 22 C.F.R. 42.51; *Zixiang Li v. Kerry*, 710 F.3d 995, 1005 (9th Cir. 2013) (Reinhardt, J., concurring). Thus, it is important that Defendants communicate in order to comply with their statutory obligations. *Id.* at 1005-06. This cooperative process is not illegal and not sufficient to substantiate a subdelegation claim.

Second, Plaintiffs lack standing to challenge USCIS role in this process. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (standing requires, among other things a concrete injury in fact). Plaintiffs are the very individuals who *benefit* from USCIS's interpretation of "immediately available" and cannot plausibly allege injury from DOS's alleged subdelegation to USCIS. Under the new two-chart system, when demand permits, USCIS may allow a *greater* number of individuals to submit applications than would be permitted under DOS's Final Action Chart. As a result, Plaintiffs are much closer to the front of the line for filing an adjustment of status application. Should Plaintiffs' succeed on their subdelegation claim, they would suffer greater harm because USCIS would no longer have the ability to accept filings from more individuals than would be permitted to file under the Final Action Chart. Therefore, Plaintiffs have not alleged an injury based on subdelegation and lack constitutional standing to bring this claim.

C. Plaintiffs "immediately available" claims are insufficient to plead a violation of the APA (Counts IV and V).

Plaintiffs make three arguments in support of their "immediately available" claims, most of which are duplicative of other claims and not relevant to Counts IV and V. First, Plaintiffs repeat their subdelegation arguments and contend that the Revised Bulletin was impermissibly

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dictated by USCIS and the result of non-specific “political pressure.” As discussed, USCIS’s role in interpreting the statute does not constitute unlawful subdelegation and, in any event, has not injured Plaintiffs because it allows individuals like Plaintiffs to submit applications for adjustment of status earlier.

Second, Plaintiffs criticize USCIS’s interpretation of “immediately available,” without explaining the proper interpretation of the claim. Plaintiffs have not offered any meaningful explanation of why Defendants’ interpretation of “immediately available” is incorrect – much less that it is arbitrary or capricious.[1] Plaintiffs’ unsupported and non-specific disagreement with Defendants’ reading of the statute is not enough to satisfy Rule 12, especially where Plaintiffs have not identified an alternative interpretation or explained how their alleged harm would be remedied under an alternative interpretation.

Finally, Plaintiffs rehash their claim that the Revised Bulletin contains an insufficient explanation for the change. Plaintiffs, however, have not cited any legal authority for their contention that Defendants were required to give any explanation at all, much less one that defends each revised date with the specificity Plaintiffs demand. Defendants have provided Plaintiffs with all the explanation necessary to support a decision to revise six pre-effective estimated eligibility dates: Defendants revised the bulletin to better align with their statutory obligations. Plaintiffs’ request for anything more is not required by the APA.

D. Plaintiffs’ waitlist claims fail to make an argument, much less state a claim capable of redress in this litigation (Counts VI and VII).

Plaintiffs’ allegations in Counts VI and VII should be dismissed for failure to state a claim. Plaintiffs still have not alleged any specific inaccuracy in the waitlist or waitlist

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[1] Plaintiffs incorrectly state that Defendants failed to issue 6,000 employment-based immigrant visas last, and cite that erroneous assertion as support for their position that Defendants’ justification for the Revised Bulletin is capricious. Plaintiffs are misreading the State Department’s annual report, which shows on the last page of Table V (Part 3) that 143,952 employment-based immigrant visas were issued. It appears Plaintiffs are relying on a subtotal of 134,188 on an earlier page of the report. *See* https://travel.state.gov/content/dam/visas/Statistics/AnnualReports/FY2015AnnualReport/FY15AnnualReport-TableV.pdf (last visited Mar. 14, 2016).

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procedure, but only generally contend that DOS has "failed to maintain" a waiting list and to "consider the waitlist" here. ECF No. 30 at 23. It remains entirely unclear what statutory, regulatory, or other duty Plaintiffs allege Defendants violated. The failure to include such an allegation is fatal to this claim in the Ninth Circuit. *See Zixiang Li*, 710 F.3d at 1001 (dismissed claim challenging failure to maintain "an elaborate system for monitoring priority dates or the number of pending applications" due to Plaintiffs' failure to plead a specific statutory requirement with which USCIS was failing to comply). Here, the Revised Bulletin itself undermines the plausibility of Plaintiffs' claims regarding the waitlist. The Revised Bulletin affirmatively states that (1) DOS maintains a priority date list that is based on reported information, and (2) that the priority date list was relied upon in setting priority dates in the Revised Bulletin:

> Procedures for determining dates. Consular officers are required to report to the Department of State documentarily qualified applicants for numerically limited visas; USCIS reports applicants for adjustment of status. Allocations in the charts below were made, to the extent possible, in chronological order of reported priority dates, for demand received by September 9th. If not all demand could be satisfied, the category or foreign state in which demand was excessive was deemed oversubscribed. The cut-off date for an oversubscribed category is the priority date of the first applicant who could not be reached within the numerical limits. If it becomes necessary during the monthly allocation process to retrogress a cut-off date, supplemental requests for numbers will be honored only if the priority date falls within the new cut-off date announced in this bulletin. If at any time an annual limit were reached, it would be necessary to immediately make the preference category "unavailable", and no further requests for numbers would be honored.

ECF No. 22-7. Thus, it is not sufficient for Plaintiffs to baldly allege that there is no priority list without an explanation of the claims.

Additionally, without a more specific allegation, Plaintiffs have failed to demonstrate that they were injured by Defendants' waitlist procedures and that their injuries are capable of redress through different waitlist procedures. *Lujan*, 504 U.S. at 560. As it stands, Plaintiffs allege only a desire to be higher on the priority date list and do not allege any basis for believing that their current place on the list is a result of erroneous actions taken by Defendants that may be addressed by this Court. As such, Plaintiffs simple desire to be higher on the list (or for more than the statutory number of visas to be issued) cannot be remedied here. Thus, without a more

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specific allegation of how the current waitlist is insufficient, Plaintiffs have not pled a plausible claim that is capable of redress in this litigation. This claim must be dismissed.

III. Plaintiffs have no constitutionally protectable interest in holding Defendants to a rescinded, pre-effective visa bulletin (Count III).

In order to state a constitutional claim, Plaintiffs agree that they must demonstrate that Plaintiffs have "a reasonable expectation of entitlement" to file their applications that is "based on an existing rule or understanding that stems from an independent source such as state law." ECF No. 30 at 24 (quoting *Wedges/Ledges of Calif., Inc. v. City of Phoenix, Ariz.*, 24 F.3d 56, 62 (9th Cir. 1994)). Plaintiffs rely exclusively on the publication of the Superseded Bulletin as creating their property interest. Plaintiffs concede they do not have any current expectation or entitlement to file applications under the current visa bulletin (March 2016, *available* at https://travel.state.gov/content/visas/en/law-and-policy/bulletin/2016/visa-bulletin-for-march-2016.html (last visited Mar. 13, 2016)). Instead, their interest is entirely rooted in actions they themselves took in reliance on the Superseded Bulletin between the dates of September 10 and September 25, 2015. Plaintiffs' actions did not create a liberty interest sufficient to overcome the government's obligation to administer the visa program in a manner that ensures compliance with Congress's annual numerical limits on employment-based visas.[2]

Plaintiffs have not demonstrated that their reliance was sufficient to create a liberty or

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[2] Plaintiffs attempt to reframe the dispute by encouraging this Court to simply accept Plaintiffs' legal assertion that visa numbers are "immediately available" to them within the meaning of the statute. ECF No. 30 at 25-26. This begs the question by presuming the existence of a property interest created by statute and is not the type of factual allegation that the Court must accept as a matter of pleading. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions."). Further, no such property interest exists. The statute strictly limits the number of visas that may be issued each year and does not create any interest in those visa numbers until Defendants announce that the visa number is available or authorized for issuance. 8 U.S.C. § 1255(a)(3), (c); 8 C.F.R. §§ 204.5(d), 245.1(a), (g). Here, even under the Superseded Bulletin, Defendants have never declared the visa number authorized for issuance, but merely incorrectly suggested that Plaintiffs may in the near future begin the adjustment of status application process. As discussed, that announcement is not sufficient to create a constitutionally-protected interest in filing.

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property interest. Plaintiffs' actions were not based on the type of deeply rooted and longstanding tradition capable of forging a liberty or property interest where one otherwise does not exist. The cases cited by Plaintiffs demonstrate this point. *See, e.g.*, *Perry v. Sinderman*, 408 U.S. 593 (1972) (ten years of personal dealings created reliance); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (finding a liberty interest in seeking parole). The two-chart process set out in the Superseded Bulletin was new, untested, and issued in advance of the effective date as a courtesy to applicants. Thus, any pre-effective significance Plaintiffs attributed to the Superseded Bulletin was speculative and not based on traditional practice. Plaintiffs' speculative reliance cannot anchor their due process claim. *See id*.

Plaintiffs appear to acknowledge that, even if they have some limited property interest based on their reliance on Superseded Bulletin, the only procedural modification to which they are entitled is additional notice prior to rescission or a more fulsome explanation. *See* ECF No. 30 at 27; ECF No. 22-1 at 44. Despite professing entitlement to only a small procedural tweak, Plaintiffs assert that the government's failure to give them the required notice or explanation now entitles them to an enormous windfall: permission to file their adjustment of status applications anyway. Plaintiffs have not presented any legal basis for remedying that violation with such a dramatic order. Just as "two wrongs can't make a right," an agency's improper assertions of authority cannot grant the agency power it otherwise lacked. Accordingly, Plaintiffs' constitutional claim fails as a matter of law and must be dismissed.

IV. The Court cannot order the relief requested by Plaintiffs.

In their response brief, Plaintiffs concede that Plaintiffs are not entitled to monetary damages in this litigation and focus instead on their request that the court order the Defendants to reinstate the Superseded Bulletin. ECF No. 30 at 28. Plaintiffs have not raised a claim that (even if meritorious) would permit the Court to reinstate the Superseded Bulletin. Plaintiffs' only argument to the contrary relies on a description of the relief available under 5 U.S.C. 706(1), which permits APA challenges to "compel agency action unlawfully withheld or unreasonably delayed." Plaintiffs, however, do not raise a Section 706(1) claim in their complaint, but instead rely exclusively on a different APA cause of action, 5 U.S.C. 706(2), which gives courts the

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authority to set aside unlawful agency actions and remand the matter to the agency for further consideration. *Delgado v. Holder*, 648 F.3d 1095, 1103, n.12 (9th Cir. 2011). Counts I, II, and V explicitly state a cause of action under Section 706(2). Counts VI and VII are less explicit, but similarly appear to make Section 706(2) claims.[3] Section 706(2) does not give courts the authority to independently review the record and to itself choose the proper course of action on behalf of the agency. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 657-58 (2007); *see also Salt Pond Associates v. U.S. Army Corps of Engineers*, 815 F. Supp. 766, 775-76 (D. Del. 1993). Because Plaintiffs have not raised a claim under 5 U.S.C. 706(1) that would entitle them to an order reinstating the Superseded Bulletin, the only appropriate remedy for these claims would be remand to the agency. Plaintiffs' reinstatement request should be struck from the complaint.

[3] Even if read as stating a Section 706(1) claim, it may only be read as seeking to compel DOS to maintain a waitlist and DHS to provide accurate information to DOS, not the reinstatement of the Superseded Bulletin. *Id*. at 44-46.

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CONCLUSION

For the foregoing reasons, the Defendants ask that the Court grant the Motion to Dismiss the Second Amended Complaint.

Dated: March 14, 2016

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 14, 2016, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically filed Notices of Electronic Filing.

/s/ Sarah Wilson
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